IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2444 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANUBHAI BABUBHAI PATEL

Versus

DISTRICT MAGISTRATE

Appearance:

MR YN OZA WITH AMAR N BHATT for Petitioner

MR HL JANI, AGP for Respondent Nos.1 and 2

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 10/05/2000

C.A.V. JUDGEMENT

Rule. Mr.H.L.Jani, learned APP for the respondent-State waives service of rule.

2. The petitioner in this petition seeks a direction to quash and set aside the order of detention dated 18th

January, 2000 passed against him under the provisions of Gujarat Prevention of Anti-social Activities Act (hereinafter referred to as `the Act' for the sake of brevity) detaining the petitioner under the provisions of the Act. It is not in dispute that the said order of detention has yet not been served upon the petitioner.

3. The petitioner is a resident of Union Territory of Daman and he is doing the business there since long. It is the say of the petitioner that the respondent No.1 affixed notice purported to be dated 28-2-2000 on the premises of the petitioner in or about the first week of March, 2000 in form No.4 stating therein that an order bearing No.DCB/MAG/PASA/1/2000 dated 18-1-2000 under the Act was passed against the petitioner in connection with cases under Secs.66(1)(B),65-A, 116-A, 65 AE and 81 of the Bombay Prohibition Act, but a copy of the said order has not been served on him. It is further the say that representation dated 23rd March, 2000 made by the wife of the petitioner against the said order has not been replied by the respondent and, therefore, the petitioner by this petition challenges the said order at the pre-execution stage, on the ground that order of detaining the petitioner is ex-facie bad, perverse, illegal and in violation of the Act. According to petitioner, out of six cases registered against the petitioner at Atul Police Station, though petitioner was having order under Sec.438 of the Code of Criminal Procedure in his favour, he has been arrested by the investigating officer and kept in police custody for a period from 15-1-2000 to 16-1-2000 consequent upon granting police custody by the concerned Magistrate. It is the say of the petitioner that inspite of aforesaid facts, the respondent No.1 has mechanically passed the impugned order without subjective satisfaction and objective and judicial inquiry. It is submitted that there is no prohibition in Daman and, therefore, sale of liquor by him in Daman cannot be held to be guilty. It is further submitted that he is not involved in illegal transportation of liquor or in any of the offences referred in the case and, therefore, he has approached this Court challenging the impugned order.

4. On behalf of the respondents, District Magistrate, Valsad has filed affidavit-in-reply mainly contenting that though order has been passed on 18th of January, 2000, till today, it could not be served on the petitioner-detenu inspite of several attempts made by the police and, therefore, petitioner was declared absconding under the provisions of Cr.P.C. by notification dated 20th February, 2000 and on this ground alone, the

petition is required to be dismissed. It is further contended in the said affidavit that the order passed by him is purely on merits after arriving at a subjective satisfaction about the need of passing such an order of detention based on the material placed before him and for the purpose of achieving the object of the Act. It is further contended by him that it is very clear from the material placed before him that the petitioner is illegally dealing in liquor and, therefore, order of detention is rightly passed by him and it has not been passed on vague and extraneous reasons and on irrelevant considerations. According to him, he is empowered to pass such an order of detention against the detenu in the present case and, therefore, present petition is required to be dismissed.

5. I have heard learned senior counsel, Mr.Y.N.Oza with Mr.Amar N.Bhatt, learned counsel for the petitioner and learned APP, Mr.H.L.Jani for the State.

6. Learned senior counsel for the petitioner, Mr.Y.N.Oza has argued the same which he has contended in the petition and, therefore, it is not necessary to refer or reproduce the same at this stage. He has relied upon the case of Additional Secretary to the Govt. of India and others vs. Smt.Alka Subhash Gadia and another, reported reported in 1992 S.C.C. (Cri.) 301 and more particularly in pare 30. He has contended that out of five exceptions carved out by the Apex Court in the Alka Gadia's case, case of the present petitioner is squarely covered under exception Nos.(iii) and (iv).

7. Learned APP for the State, Mr.Jani has argued that since the order of detention has yet not been served on the petitioner, present petition is not maintainable. He has relied upon a case reported in 2000 Criminal Law Journal (Bombay) page 1014. He has also relied upon an unreported judgment delivered in Special Civil Application Nos.6493 of 1998 with Special Civil Application Nos.6596/98, 6597/98 and 6598/98 by this Court (Coram: N.N.Mathur, J.) on 20th August, 1998.

7.1 He has also relied upon the decision of the Apex Court in the case of Union of India and others Vs. Parasmal Rampuria reported in 1998(8) Supreme Court Cases 402. Petitioner in that petition, against whom detention order under COFEPOSA Act was passed, had filed a writ petition in the High Court before surrendering, challenging the detention order at pre-execution stage and obtained ad-interim relief which was ultimately vacated by the learned Single Judge. Thereafter,

petitioner in that petition went in appeal before the Division Bench and again obtained ad-interim relief which was extended from time to time and ultimately at the part-heard stage of final hearing of that appeal, Union of India approached the Apex Court against the order of the Division Bench granting interim relief. The Apex Court in para 4 of the above judgment has remarked this as under:

> "In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court".

It has been observed by the Apex Court in para 5 as under:

> "When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution of India."

So, in the above reported decision, Apex Court has categorically held that petition at the pre-execution stage is not maintainable. Same view has been taken by this Court in Special Civil Application Nos.6493 of 1998 with Special Civil Application Nos.6596/98, 6597/98 and 6598/98 relying upon the judgment reported in Alka Gadia's case.

8. I have gone through the detailed affidavit which has been filed by the District Magistrate, Valsad. Prima-facie it is established from the said affidavit that the order passed by the authority is not vague based on extraneous or irrelevant grounds. Though the learned counsel for the petitioner has argued that he gets the benefit of exception Nos.(iii) and (iv) as stated in the Alka Gadia's case, it is very difficult to appreciate as to how, even without having the detention order in his hand, detenu can file a writ petition contenting the grounds of detention as either vague, extraneous or irrelevant. Obviously, it was not possible for the petitioner-detenu to demonstrate as to how the order is passed, whether it is based on vague, extraneous or

irrelevant reasons in the absence of order of detention with him. This means that the arguments advanced by the learned counsel for the petitioner is based only on presumptions. I am of the opinion that case of the present petitioner does not fall either under exception Nos.(iii) and (iv) or under any of the other exceptions carved out by the Apex Court in Alka Gadia's case.

9. I am aware that the jurisdiction vested in the court under Article 226 of the Constitution has to be used very sparingly and under the circumstances where no efficacious remedy existed. It is to be noted that under preventive detention, if a detenu is permitted to challenge the order of detention and seek stay of the order even before it is executed, the very purpose of passing the order of detention and the law under which it is passed would be frustrated. The Apex Court has, therefore, observed that even if the case falls in one of the five exceptions mentioned in Alka Gadia's case, the court is not obliged to interfere at the pre-execution stage and it should ensure that the detenu should submit to the order of detention. It is made clear from the observations of the Apex Court in the decision of the Alka Gadia's case. Again same view has been taken by the Apex Court in the case of Parasmal Rampuria's (supra) case and, therefore, I do not repeat the same. Keeping in mind the fact that present petition has been filed by the petitioner at a pre-execution stage even without a copy of the detention order in hand and if anything will be discussed at this stage on merits, it will certainly affect the rights of the parties and, therefore, I am not discussing anything on merits at this stage. I, therefore, hold that there is no substance in the contention raised by the learned counsel for the petitioner. I also hold that case of the present petitioner does not fall in any of the exceptions carved out by the Apex Court in the Alka Gadia's case. Hence, the present petition at the pre-execution stage is not maintainable.

10. Having regard to the facts and circumstances of the case, no interference is called for at this stage and this Special Civil Application is rejected. Any observation made will not have reflection on any proceedings in the matter. Rule is discharged.

(R.P.DHOLAKIA,J.)

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